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No. 72-1401

In the
Supreme Court of the United States
October Term, 1972

BALAX, INC. and JOHN M. VAN VLEET,
Petitioners,

vs.

THE BENDIX CORPORATION and
SELLEW CORPORATION,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE*

This Petition for Writ of Certiorari represents another step in Balax's continuing effort to obtain judicial support for its unique view of the Sherman Act. Balax argues that the grant of a patent license containing a term precluding patent contestability constitutes a Sherman Act violation. In effect, Balax is saying that the Supreme Court decision in *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969) created an antitrust remedy which can be enforced retroactively.

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* Petitioners Balax, Inc. and John M. Van Vleet will be referred to collectively as "Balax," and respondents The Bendix Corporation and Sellew Corporation as "Besly," the terminology used during the prior proceedings below.

Balax's Petition asserts that the Seventh Circuit Court of Appeals erred in deciding three issues. Balax contends that: (1) the Seventh Circuit incorrectly decided that licensee estoppel clauses in patent license agreements were valid and enforceable prior to *Lear;* (2) the Seventh Circuit improperly defined the relevant market; and (3) the Seventh Circuit incorrectly concluded that Balax had not been injured by any acts of Besly.

Respondents submit that the Seventh Circuit decision was correct and proper in all respects. Passing that issue for the moment, this case lacks the significant and crucial appellate issues which should concern the Supreme Court of the United States. The question of licensee estoppel already has been decided. This court held in *Lear* that licensee estoppel was no longer the law. Since 1969, every patent licensee has been free to contest validity.

This case is unique in that it is one of the very few cases where licensee estoppel can be remotely related to an antitrust issue. Licensee estoppel is a doctrine that prevents a person operating under a patent license or assignment from contesting the validity of the patent from which he benefits. The Supreme Court held in *Lear* that this doctrine should be discontinued. Since 1969, licensee estoppel terms have been automatically void and unenforceable.

Balax's claim is based on the theory that pre-1969 license agreements using "estoppel" language violate the Sherman Act. This unique view of the Sherman Act raises supposed antitrust consequences for only those few license agreements entered into prior to 1969, and then only to the extent the statute of limitations has not run. Thus, any decision rendered in this case on this limited issue would have virtually no precedential value. It would have prac-

tically no impact upon any persons other than the parties hereto. Certainly, this is not the type of case which should be before the Supreme Court.

The remaining two issues—relevant market and injury—were decided on primarily factual grounds. The Supreme Court of the United States should not be concerned with factual issues which have no precedential value or impact beyond the particular case at hand.

STATEMENT OF KEY FACTS

Besly developed the first commercially feasible swaging tap in the United States and in good faith obtained patents covering its swaging tap invention. The District Court (291 F. Supp. 328 at 347) and the Seventh Circuit (421 F. 2d 809 at 819) held that Besly had applied for, obtained and enforced its patents in good faith, and Balax has never challenged those findings. As Balax conceded and the Seventh Circuit held, Besly's actions must be judged as though its patents were valid (Balax Seventh Circuit Brief, p. 48; 471 F. 2d 149 at 154, 155). Besly's patents gave it the exclusive right to manufacture and sell its patented swaging taps in the United States. In short, Besly possessed a lawful monopoly granted by the Constitution and statutes of the United States.

Besly chose, however, not to foreclose other manufacturers from manufacturing and selling its patented swaging taps. Besly freely licensed others, thereby establishing substantial competition in a new product. By virtue of their license agreements, other competing manufacturers were able to avoid the necessity of developing a non-infringing swaging tap. They achieved instant entry into a new and expanding market, where they immediately began to compete with Besly. (A. 329, 333, 341-42).

Balax never became a licensee and unfairly suggests that Besly refused to license it in order to eliminate it as a competitor (Balax Petition, pp. 3, 11). This unfounded claim was disposed of below on the basis of facts which established that Besly in good faith had offered a license to Balax.* (471 F. 2d at 152-53).

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* In 1961, long before Balax began to manufacture taps, it sought a license from Besly. Van Vleet (Balax's founder and an individual petitioner) informed Besly that he had developed an improved swaging tap which was superior to the Besly swaging tap. (A. 239-40, 319) At that time, Balax was a new company which employed only four unskilled laborers and mechanics (A. 493), had never manufactured a swaging tap (A. 100, 206) and, in Van Vleet's words, had "no product to sell." (A. 493-94)

Van Vleet suggested a cross-license arrangement between Besly and Balax as soon as he had proven that his Balax tap was better than Besly's product. (A. 277-78, 286-87, 302-03, 308-09) Of course, since Balax had never manufactured a swaging tap, Balax needed Besly's technical assistance to produce and test sample taps (A. 302-03). During the course of their joint efforts, Besly gave Balax free access to its secret engineering and technical data (A. 298) and Van Vleet took copious and detailed notes of his conversations with Besly engineers. (PX 124, 126, 127, 129, 131, 133, 137, 139, 140 and 146, App. Ex. pp. 156-160, 163-171, 174-179 and 190-191). Van Vleet evidently was seeking his stated goal of using Besly as a "short-cut" into the swaging tap business (A. 300). However, unlike Besly's licensees, Balax never paid for the "short-cut" which it obtained. When it turned out that the Balax tap was no better than the Besly tap, negotiations reached an impasse and were terminated (PX 175, App. Ex. pp. 193-201; A. 100). Three months later, Balax sold its first commercial swaging taps (A. 203-04).

After the first hearing, the District Court found that Balax had appropriated trade secrets belonging to Besly, but denied relief because there was no "confidential relationship" between the parties. The court stated that Besly should have taken greater precautions to safeguard its secret and confidential data from Balax. (291 F. Supp. at 345-46).

In the tap industry, manufacturers market their products through independent distributors. In the United States, there are over 20,000 independent distributors who purchase swaging taps and resell them to hundreds of thousands of machine shops and other users. These independent businessmen owe no allegiance to any manufacturer. They purchase the product, warehouse it and sell it at prices which they set. (A. 553, 670-72)

Besly's license agreements created competition between distributors at the retail level. If Besly had maintained its lawful patent monopoly, its distributors would have been the only persons selling such taps at retail. In fact, Besly's license agreements enabled thousands of other distributors to offer and sell competing swaging taps. Viewed from the distributorship level, the source of supply of swaging taps had expanded to include the following manufacturers: United-Greenfield; Jarvis; Continental Screw; National Twist Drill; Union Twist Drill; Cleveland Twist Drill; Threadwell; John Bath; Pratt & Whitney.

Balax claims that these license agreements—terminated in 1969—violate the Sherman Act because they included provisions under which the licensees agreed to respect the Besly patents which they were licensed to use. The Seventh Circuit Court of Appeals held that this contention lacked any merit since licensee estoppel, applied by both common law and contract, was valid prior to *Lear*. Moreover, there was no indication that these licensee estoppel clauses had any actual impact on any licensee. Prior to entering into a license agreement, each licensee had been free to contest patent validity. There is no evidence that, after entering into a license agreement, any licensee ever sought to contest Besly's patents. In short, Balax made no effort to establish any casual connection between the challenged licensee estoppel clause and any injury to it.

Balax suggests that Besly's license agreements prevented it from selling to other tap manufacturers and distributors of taps (Balax Petition, pp. 9, 15-16). This argument assumes that Besly's patents blanketed the entire swaging tap product line. However, this is not the case. While Besly's patents were in force, Balax obtained its own patents covering an improved type of swaging tap. (A. 461, 474) What better proof can there be that Besly's patents did not cover all swaging taps?

Besly's license agreements were limited to swaging taps of the type covered in its patents. Its licensees were free to manufacture or purchase any type of non-infringing swaging tap, including Balax's patented taps. More significantly, Balax was able to sell its swaging taps to any of 20,000 independent distributors throughout the country.

Balax's claim of injury is suspect. Besly's licensing arrangements have not limited Balax's ability to compete. Balax was not a licensee and thus was free to contest the patents.

The market facts of record attest to the absence of any competitive restraints on Balax. Between 1964 and 1970, Balax's sales of swaging taps increased by 600%, from $108,000 to $647,000. At the same time, Besly's market position was deteriorating. While its licensee's sales more than doubled, Besly's sales in 1970 were barely 3% greater than they were in 1964. (471 F. 2d at 162; A. 143; PX 183, App. Ex. p. 265).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Balax's antitrust claim against Besly is founded upon the *Lear* decision of this Court. For that reason, this case is a virtual anachronism. As mentioned *infra*, it is virtually an impossibility for any future cases like *Balax* v. *Bendix* to arise. Since 1969, licensee estoppel provisions have been void and unenforceable. Any decision in this case affects only those license agreements entered into prior to 1969, and then only to the extent that the four-year statute of limitations has not run.

This case has little precedential value. For that reason alone, the Supreme Court of the United States should deny *certiorari*. Moreover, the decision rendered by the Seventh Circuit Court of Appeals follows established legal precedent and correctly applies the law to the facts of this case.

THE SEVENTH CIRCUIT PROPERLY REFUSED TO APPLY LEAR RETROACTIVELY TO CONDEMN BESLY'S PRE-1969 LICENSE AGREEMENTS MADE IN GOOD FAITH IN RELIANCE ON PRIOR LAW.

This case is a direct outgrowth of the Supreme Court decision in *Lear, Inc.* v. *Adkins*, 395 U.S. 653 (1969), rendered during the pendency of the first appeal to the Seventh Circuit. This case originated as a patent infringement suit filed by Besly. Balax interposed its antitrust counterclaim, which charged two violations of the Sherman Act: (1) that Besly had unlawfully procured and enforced its patents; and (2) that Besly's license agreements extended the scope of its patent monopoly in violation of the Sherman Act. After the first hearing, the District Court held that Besly's product patent was valid and infringed and dismissed Balax's counterclaim on the grounds that it had "no merit." 291 F. Supp. at 348.

On the first appeal, the Seventh Circuit affirmed the District Court holding that Besly had obtained and enforced its patents lawfully and in good faith. However, the court noted that Besly's license agreements contained licensee estoppel provisions, which had been abolished by the Supreme Court in *Lear*, decided while the appeal was Pending. Thus, the Seventh Circuit remanded for the District Court to consider "the relevance, if any, of *Lear* . . ." (421 F. 2d 809 at 821).

On remand, the District Court held a two-day hearing. On essentially the same evidence which had been presented at the first hearing, the District Court concluded that Besly had violated the Sherman Act, apparently interpreting the remand as a direction to apply *Lear* retroactively and enter judgment for Balax. The remand decision amounts to the District Court's conclusion that a licensee estoppel term in patent license agreements is an anticompetitive device which *per se* violates the Sherman Act. (321 F. Supp. 1095 at 1096).

The Seventh Circuit reversal recognizes the salient fact that the licensee estoppel provisions in Besly's license agreements had no legal or practical impact upon any licensee. Prior to the *Lear* decision, licensee estoppel was the law of the land. The law implied a licensee estoppel term in every patent license agreement. Besly's licensees could not have challenged the licensed patents, whether or not the agreement contained explicit language to that effect.

As long ago as 1905, the Supreme Court recognized "the assumption that a licensee, when sued for royalties, is estopped to deny the validity of the patent which he has been using . . ." *United States* v. *Harvey Steel Co.*, 196 U.S. 310 at 317 (1905). As the Seventh Circuit pointed

out, the Supreme Court in 1950 reaffirmed "the general rule" that a licensee is estopped to deny the validity of the licensed patent. *Automatic Radio Manufacturing Co.* v. *Hazeltine Research, Inc.*, 339 U.S. 827 at 836 (1950).

Licensee estoppel has been applied in numerous federal and state court cases. *E.g., United Manufacturing & Service Co.* v. *Holwin Corp.*, 187 F. 2d 902 (7th Cir. 1951); *Prestole Corp.* v. *Tinnerman Products, Inc.*, 271 F. 2d 146 (6th Cir. 1959). See 69 C.J.S., *Patents*, §160 at 621-22.

Since the law implied a licensee estoppel term in every patent license agreement, an explicit term to that effect was valid and enforceable prior to *Lear*. *E.g., Baker-Cammack Hosiery Mills, Inc.* v. *Davis Co.*, 181 F. 2d 550 (4th Cir. 1950) *cert.* denied 340 U.S. 824; *Hope Basket Co.* v. *Product Advancement Corp.*, 89 F. Supp. 116 (W.D. Mich. 1950) aff'd 187 F. 2d 1008 (6th Cir. 1951) *cert.* denied 342 U.S. 833; *Carter Products, Inc.* v. *Colgate-Palmolive Co.*, 164 F. Supp. 503, 525 (D. Md. 1958).

Balax refuses to recognize the overwhelming weight of judicial precedent, claiming that this case is controlled by *Pope Manufacturing Co.* v. *Gormully*, 144 U.S. 224 (1892). However, *Pope*, which was not an antitrust case, does not support Balax's contention. The patentee, Pope, owned several patents covering various aspects of its product line. Pope licensed a limited number of its patents and extracted a covenant that the licensee would not contest the validity of Pope's *non-licensed* patents. This is the crucial distinction between the *Pope* case and the unbroken line of cases upholding licensee estoppel. Prior to *Lear*, the law implied and the parties lawfully could contract that the licensee would not contest validity of his *licensed* patents. Besly's licensee estoppel terms likewise applied only to its *licensed* patents. In *Pope*, however, the patentee

obtained protection for *non-licensed* patents. This is why the Supreme Court refused specific enforcement of the patent license in *Pope*.

The Seventh Circuit held that Besly's licensee estoppel terms, which were limited to its licensed patents, were valid when made and refused to apply *Lear* retroactively to create antitrust liability stemming from agreements made years earlier in reliance on prior law. In short, the Seventh Circuit held that licensee estoppel, prior to *Lear*, was a part of a patentee's lawful monopoly. Balax does not appear to question the Seventh Circuit application of the "retroactivity" factors noted by this Court in *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971).

Balax suggests in its Petition that there is an antitrust difference between a manufacturing and a non-manufacturing license agreement. (Balax Petition, p. 15) The law has never recognized such a distinction. A patentee has the exclusive right to make, use and sell any product embodying the patent. The law permits him to divide up those rights as he sees fit. The patentee lawfully may license one person to manufacture the patented product and another person to sell it. *Extractol Process, Ltd.*, v. *Hiram Walker & Sons, Inc.*, 153 F. 2d 264 (7th Cir. 1946); *Rock-Ola Manufacturing Corp* v. *Filben Manufacturing Co.*, 168 F. 2d 919 (8th Cir. 1948); *Security Materials Co.* v. *Mixermobile Co.*, 72 F. Supp. 450 (S. D. Cal. 1947).

Besly freely offered licenses to other manufacturers to manufacture and sell swaging taps embodying its patents. Those manufacturers who wanted to manufacture swaging taps in their own facilities were given manufacturing licenses. Other manufacturers did not foresee a

market large enough to justify the necessary cost of tooling; Besly agreed to supply them with their requirements of its patented swaging taps and gave them the option to commence manufacturing in their own factilities at any time.

Both types of license agreements—manufacturing and non-manufacturing—are subject to the same legal consequences. In *Steiner Sales Co.* v. *Schwartz Sales Co.*, 98 F. 2d 999 (10th Cir. 1938) *cert.* denied 305 U.S. 662, the Tenth Circuit enforced a licensee estoppel term in both manufacturing and non-manufacturing license agreements, holding that the license term went "no further than the estoppel which the law itself imposes upon a licensee." 98 F. 2d at 1009.

Balax attempts to characterize Besly's non-manufacturing licenses as requirements contracts. (Balax Petition, pp. 15-19) This contention misconstrues the limited nature of the license. Besly's license agreements were limited to swaging taps "of the character described and claimed in" the Besly patents. (PX 17, 19, 20, and 21, App. Ex. pp. 104-105 and 107-119) Every licensee was free to purchase non-infringing taps from any source, including Balax. Significantly, Balax manufactured non-infringing taps; it obtained patents covering its "no lead error" swaging tap invention. (A. 461, 474) Besly's licensees were free to purchase Balax's non-infringing swaging taps at the same time that they were manufacturing or purchasing Besly's swaging taps. Moreover, 20,000 independent distributors were free to buy Balax taps for resale to ultimate users.

A "requirements" agreement limited to a patented product does not, as a matter of law, result in any unlawful market foreclosure. Such a requirements provision is

simply an agreement not to infringe the licensed patents, an obligation already imposed by the patent laws. There can be no unlawful impediment to competition so long as the licensee remains free to deal in non-infringing products. *E.g., Steiner Sales Co.* v. *Schwartz Sales Co.*, 98 F. 2d 999 (10th Cir. 1938), *cert.* denied 305 U.S. 662; *Baldwin-Lima-Hamilton Corp.* v. *Tatnall Measuring Systems Co.*, 169 F. Supp. 1 (E.D. Penna. 1958), aff'd 268 F. 2d 395 (3rd Cir. 1959), *cert.* denied 361 U.S. 894.

THE SEVENTH CIRCUIT PROPERLY DEFINED THE RELEVANT MARKET IN THIS CASE AND ANY ERROR IN ITS MARKET DEFINITION WAS IN BALAX'S FAVOR.

Balax has contended throughout this case that the claims of a patent effectively delineate a relevant product market for antitrust purposes. The *DuPont* "cellophane" case, *United States* v. *DuPont*, 351 U.S. 377 (1956), demolishes that argument. The Government contended that the relevant market consisted of cellophane, a patented product. This Court held that the relevant product market included all products which were "reasonably interchangeable" in a commercial sense. Thus, the relevant market in the *DuPont* case included those products which were offered and sold to the public in competition with cellophane.

The existence of a patent is basically immaterial to the question of relevant market. For example, General Electric has introduced a new lawn mower powered entirely by batteries. Whether or not General Electric has a patent on its product is immaterial to its position in the actual market. General Electric must compete with dozens of other companies who manufacture power lawn mowers—gasoline powered and electric. Its battery-powered lawn

mower is simply a new product which competes with other power lawn mowers for the favor of customers.

Similarly, swaging taps are a relatively new product competing in the marketplace with other products performing the same function—making internal threads in holes. Prior to Besly's development of swaging taps, this function was performed entirely by cutting taps. At the present time, both products are in competition for the favor of customers. Balax advertises that its swaging taps "are designed for use with conventional equipment." (PX 57, App. Ex. p. 142) Its sales manager concedes that cutting tap salesmen constitute substantial competition to Balax, which sells only swaging taps.

> Q. . . . does the cutting tap salesman constitute any substantial competition to you?
> A. Yes, yes. (A. 535)

Machine shops find it convenient to use both cutting taps and swaging taps in their operations. (A. 170, 193) The interchangeability between these types of taps makes it desirable for manufacturers to produce and offer both swaging and cutting taps to their distributors. (A. 513, 537).

The Census Bureau recognizes only one product line in this area, encompassing both swaging and cutting taps. According to records maintained by the Census Bureau (PX 179, App. Ex. p. 204) and the Metal Cutting Tool Institute (PX 178, App. Ex. p. 201M), swaging and cutting taps account for about $60,000,000 in annual sales. In the Seventh Circuit, Balax agreed that the overall tap market was $60,000,000. (Balax Seventh Circuit Brief, pp. 9-10, 43).

Swaging and cutting taps do not compete head-to-head over the entire $60,000,000 tap market. Swaging taps

cannot be used in certain applications. Some metals are too hard or brittle; others are too elastic or "stringy." (A. 533-34, 566) Excluding these applications from the area of effective competition, witnesses for both parties testified that swaging taps and cutting taps compete in about 50% of the tap market. Balax's sales manager testified (A. 534):

> Q. If you were to combine the entire dollar volume sales of taps of all types for any purpose, about how much of that total dollar volume would you assume could not use swaging taps?
>
> A. Well, if the manufacturers of swaging taps were successful in saturating the swaging tap market completely, 100 per cent, I would estimate that about half of the—half or slightly less than half of the ground thread tap market could successfully use cold-forming taps."

Besly's general manager agreed (A. 566):

> Q. And again, directing your attention to the total industry figure or the total industry application of taps in the order of sixty to sixty-five million dollars, what percentage of that would be excluded from the swaging tap available market?
>
> A. I would say fifty percent.
>
> * * *
>
> Q. We've talked about average monthly figures in 1970. What is the—your estimate of the average monthly figure in 1970 to which the swaging tap could be applied?
>
> A. I would think possibly three million dollars worth of sales per month."

The evidence of record establishes that swaging taps and cutting taps compete in a $30,000,000 market where both types of taps can be used interchangeably on the same applications. In the Seventh Circuit, Balax agreed but contended that the $30,000,000 market was really a $6,000,000 market. Balax argued that, due to price and

performance differentials between swaging and cutting taps, $30,000,000 of cutting taps can be replaced by $6,000,000 of swaging taps. Thus, Balax contended that the relevant market was $6,000,000. (Balax Seventh Circuit Brief, pp. 6-7, 9-10, 43). The Seventh Circuit tested Besly's market power in both the actual $30,000,000 market and the hypothetical $6,000,000 market and, making all assumptions most favorable to Balax, concluded that Besly had not monopolized or attempted to monopolize. (471 F.2d at 161-63).

In its Petition for Writ of Certiorari, Balax has totally reversed its field. Balax now denies that there is any effective competition between swaging taps and cutting taps and argues that the relevant product market must be limited to swaging taps alone. (Balax Petition, p. 22) This contention is contradicted by the evidence of record admitted by Balax before the Seventh Circuit. In any case, swaging taps do not constitute a relevant "submarket" under the guidelines laid down in *Brown Shoe Co.* v. *United States,* 370 U.S. 294 (1962).*

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*1. There is no evidence of any industry or public recognition of swaging taps as a separate economic entity. Swaging taps are sold by the same distributors who handle cutting taps. In fact, the evidence establishes that it is desirable for manufacturers to offer both types of taps to their distributors (A. 513, 537, 661). The Census Bureau has only one classification of taps, encompassing both swaging taps and cutting taps (PX 179, App. Ex. p. 204).

2. Swaging taps have no peculiar characteristics or uses which differentiate them from cutting taps. They both perform the same function. The only difference between cutting taps and swaging taps is the manner in which they form the internal threads (471 F.2d at 151).

3. There are no unique production facilities. Both cutting taps and swaging taps are manufactured by

THE SEVENTH CIRCUIT HOLDING THAT BALAX FAILED TO ESTABLISH THE FACT OF DAMAGE CORRECTLY APPLIED UNDISPUTED LEGAL PRINCIPLES TO THE FACTS OF THIS CASE.

The antitrust laws permit suit to be brought only by a person who has been injured in his business or property. The fact of injury proximately caused by an antitrust violation is an indispensible prerequisite to recovery under the Sherman Act.

The fact of damage must be established by proof of two elements: (a) a wrongful act committed by the defendant; and (b) a proximate relationship between that wrongful act and injury to the plaintiff. As this court stated in *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251 at 264 (1946), the plaintiff must establish "that defendants' wrongful acts had caused damage to the plaintiffs." It is absolutely necessary that the plaintiff prove "a causal connection between an antitrust violation and an injury . . ." *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 at 187 (2nd Cir. 1970), *cert.* denied 401 U.S. 923.

Balax claims that it was injured by Besly's institution of the original patent infringement suit. (Balax Petition, pp. 24-26) However, as the Seventh Circuit pointed out, a patentee possesses the lawful right to institute suit to protect his patent rights. Balax has never challenged the ruling on the first appeal that Besly lawfully obtained and

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* (Continued)
thread grinding machinery. Production equipment can be and is located in the same plant and operated by the same type of workmen.

4. The same customers purchase swaging taps and cutting taps. Machine shop owners testified that they use cutting taps and swaging taps interchangeably in their business (A. 170, 193).

enforced its patents. In addition, the Seventh Circuit noted on the second appeal that "our examination of the record discloses no action by the plaintiff relating to the institution of this lawsuit which differs in any material respect from that of any patentee who has assumed that his patent is valid." (471 F.2d at 159).

The right to bring a patent infringement suit has been protected by Congress. The Patent Code specifically provides (35 U.S.C. §271(d)):

> No patent owner otherwise entitled to relief . . . shall be denied relief or deemed guilty of misuse or illegal extension of the patent right by reason of his having . . . sought to enforce his patent rights against infringement or contributory infringement.

Patent infringement suits have been upheld repeatedly as lawful incidents to a patent. *E.g., Jacquard Knitting Machine Co.* v. *Ordnance Gauge Co.*, 213 F.2d 503 (3rd Cir. 1954); *International Visible Systems Corp.* v. *Remington-Rand, Inc.*, 65 F.2d 540 (6th Cir. 1933); *Bela Seating Co.* v. *Poloron Products, Inc.*, 297 F. Supp. 489 (N.D. Ill. 1968). The fact that Besly's patents ultimately were held invalid is no reflection on Besly's good faith in bringing suit against Balax. The Patent Office had issued its Letters Patent after a diligent search. After a lengthy trial, the District Court had held that Besly's key patent was valid. It was only upon appeal, after six years of litigation, that the Seventh Circuit held that Besly's swaging tap patents were invalid, basing its decision upon an obscure German petty patent. Under these circumstances, Besly's good faith in filing a patent infringement suit against Balax cannot be disputed. See *Cole* v. *Hughes Tool Co.*, 215 F.2d 924 (10th Cir. 1954), *cert.* denied *sub. nom.* 348 U.S. 927.

There is no hint that Besly's efforts to protect its patent rights were the result of conspiracy or agreement with any other person. Besly took unilateral action to protect its patent rights.

Wholly apart from the lawfulness of Besly's acts to enforce its patent rights, the Seventh Circuit held that Besly's actions were not the proximate cause of any injury suffered by Balax. Balax contends that Besly's alleged antitrust violations prevented it from expanding its distribution system and thereby increasing its sales. (Balax Petition, p. 25) However, Balax's sales manager testified at the first trial that Balax had not expanded to its fullest potential because it did not carry a line of cutting taps. Because distributors prefer to carry both swaging and cutting taps, Balax, which manufactured only swaging taps, found itself at a competitive disadvantage (A. 536-37). Balax's president, Van Vleet, testified that Balax chose to concentrate its efforts on swaging taps for business reasons unconnected with Besly or Besly's patent infringement action (A. 513):

> Q. I believe you testified that as early as 1960 or 1961, Balax had made some cutting taps?
>
> A. Yes, sir.
>
> Q. With that experience, why did Balax choose or decide to go into the swaging tap market?
>
> A. For a number of reasons. One, we were unable to purchase on the outside — from an outside vendor blanks of suitable quality. We tried with three manufacturers to purchase blanks and were not successful. Second, we realized how much we — realized as the result of tests how inferior the current swaging taps were to the kind that we could build. The tests that we have run and tests that our customers had run in the field indicated a marked superiority in our product. Thirdly, we could go into the swaging tap business without the purchase — without the capital

> investment of expensive fluting equipment and make a profit. We, therefore, elected to work on that area and to meanwhile design our own fluting equipment for the cutting taps so that we would be self-sufficient and do all of our operations within our own four walls.

Balax has suggested that two other activities may have caused injury to it: (a) Besly's supposed influence of the price structure for swaging taps; and (b) Besly's license agreements with other swaging tap manufacturers. These arguments are mere make-weights. There is no evidence at all in the record that Besly had any influence over the price of swaging taps. In any event, as the Seventh Circuit pointed out, any artificial increases in the price level for swaging taps would have operated to Balax's benefit, not to its detriment. (471 F.2d at 160, 164) Balax's suggestion that Besly foreclosed the market by entering into license agreements is factually unsound. As discussed *infra*, Besly's license agreements were limited to swaging taps covered by its patents. Its licensees were free to purchase non-infringing swaging taps from Balax. Moreover, Balax was free to sell any swaging taps to any of 20,000 distributors in the country.

Balax's remarkable success in the industry belies its contention of injury. Since 1964, its sales have increased geometrically, rising from $108,000 to $647,000 in 1970. (471 F.2d at 162) Although a plaintiff's continued success in the marketplace is not absolute proof of lack of injury, it certainly tends to discredit its partisan claim that it has been mortally wounded.

CONCLUSION

Respondents urge that this case does not meet the standards followed by this Court for issuance of a writ of *certiorari*. There are no special and important reasons for review of the Seventh Circuit decision. The issues posed by petitioners are of little importance to anyone other than the immediate parties. The petitioners have not demonstrated that the Seventh Circuit failed to apply established legal principles to the facts of this case. For the foregoing reasons, petitioners respectfully submit that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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